Instrument Corporation of America *and* International Brotherhood of Electrical Workers, Local Union No. 24, AFL-CIO. Cases 5-CA-12223, 5-CA-12375, and 5-RC-11199

March 23, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On July 24, 1981, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in response, and the Charging Party filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Instrument Corporation of America, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that Case 5-RC-11199 be remanded to the Regional Director for Region 5 for further action in accord with the directions contained in the Administrative Law Judge's Decision.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discharge, lay off, terminate, or otherwise discriminate against our employees because they join, support, or engage in activities on behalf of International Brotherhood of Electrical Workers, Local Union No. 24, AFL-CIO, or any other labor organization.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, Grace A. Harry, and Richard C. Schucker immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make each of them whole for any loss of earnings each may have suffered by reason of the discrimination practiced against them by paying each of them a sum equal to what each would have earned, less any net interim earnings, plus interest.

INSTRUMENT CORPORATION OF AMERICA

DECISION

STATEMENT OF THE CASE

SIDNEY J. BARBAN, Administrative Law Judge: This matter was heard in Baltimore, Maryland, on February 26 and 27, 1981, upon complaints issued in the above cases,[1] as thereafter amended, consolidated by an order dated August 7, for hearing with the issues set forth in a Report on Challenges and Objections to the election held in Case 5-RC-11199. The complaints allege that the above-named Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (herein called the Act), by the termination of Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, and Grace A. Harry on May 13, and Richard C. Schucker on May 16. The challenges to ballots, which are sufficient to affect the results of the election, and the objections to the election involve the validity of the terminations of the employees named above. The answers to the complaints deny the

[1] The complaint in Case 5-CA-12223 issued on July 10, 1980 (all dates in this Decision hereinafter are in 1980, unless otherwise noted) based on charges filed on May 20 and July 2. The complaint in Case 5-CA-12375 issued on July 31, based on charges filed on July 7.

unfair labor practices alleged, but admit allegations sufficient to justify the assertion of jurisdiction under current standards of the Board (Respondent, engaged at Baltimore, Maryland, in the manufacture of electronic supplies and equipment, during a recent annual period sold and shipped from its Baltimore facility directly to customers outside the State of Maryland materials and supplies valued in excess of $50,000), and to support a finding that International Brotherhood of Electrical Workers, Local Union No. 24, AFL-CIO (herein called the Union), is a labor organization within the meaning of the Act.

Upon the entire record in this case,[2] from observation of the witnesses and their demeanor, and after due consideration of the briefs filed by the General Counsel, the Union, and Respondent,[3] I make the following:

FINDINGS AND CONCLUSIONS

A. *Summary of Facts and Issues*

Within 5 days after Respondent's president, J. D. Bryan, learned, on May 8, that the Union had filed a petition for certification as representative of Respondent's production and maintenance employees, Bryan directed that Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, Grace A. Harry, and Supervisor Mary Lee Brown be "permanently laid off."[4] Three days later, Bryan directed that Richard C. Schucker be terminated.

As set forth in more detail hereinafter, Respondent contends that it had actually selected Lynn Brown, Ferrell, Gray, Harry, and Mary Brown for termination in March, because of loss of business occurring about that time, before it was aware of any union activity in 1980. Respondent also asserts that it was unaware that any of these employees, except Ferrell, had engaged in activities on behalf of the Union, and the latter only in a union campaign in early 1979. It is further asserted that Schucker was terminated for cause.

The General Counsel and the Union dispute these contentions (except that Respondent knew of Ferrell's union activities). It is argued that the record as a whole is convincing that Respondent did not decide in March to terminate these employees, but only did so in May, immediately after receiving notice of the Union's petition, in order to blunt the Union's chance of winning the representation election.[5] The General Counsel questions Respondent's need for a permanent layoff, noting that in April Respondent actually hired a new employee in the mechanical assembly department, where several of the layoffs in May occurred, and in July hired a number of other new employees, as well as working its employees overtime in July to take care of the work.

The General Counsel and the Union assert that although there is no direct evidence that Respondent knew of the prounion activities of the terminated employees in 1980, such knowledge, or suspicions of their prounion sentiments, should be inferred from their activities and outspoken statements in 1979, and from activities and talk about the Union in 1980, in light of the small number of employees involved (approximately 27 in the unit in 1979 and 22 in 1980) and the fact that almost all of these employees work in a single room of relatively small area.

Although Respondent did not campaign against the Union in 1980, the record shows that, prior to the election in 1979, Respondent made it clear by letters and talks to employees and supervisors that it opposed the Union and did not want it in the plant. Bryan stated that he did not vigorously campaign against the Union in 1980 because he was then hospitalized and he felt that the employees would remember what he had said the year before.

There is a dispute as to whether Bryan told supervisors in 1979 that he would close the plant rather than deal with the Union. This is denied by Bryan. Manufacturing Manager Paul Z. Bosnick testified that he never heard Bryan make such a statement. Mary Brown testified that she heard Bryan make such a statement at a supervisors' meeting she attended (though she had some confusion as to when this occurred). Lynn Brown asserted that, after returning from such a meeting, Mary Brown told her that Bryan would close the plant if the Union came in. Fay Gray testified that Supervisor Dorothy Wenk told her that Bryan would close the doors if the Union came in. Wenk was not called to testify. On the record as a whole I credit Mary Brown. As discussed hereinafter, I have difficulty in crediting Bryan's testimony on other critical points as well.[6]

After the election in 1979, in response to complaints about Respondent's wage practices which had surfaced during Bryan's meetings with the employees, Bryan made adjustments in Respondent's policies and practices to meet these complaints. (See, e.g., G.C. Exh. 8.)

B. *Union Activities*

As has been noted, Respondent's plant is a small operation. During the times material to this matter, the number of employees in the appropriate production and maintenance unit does not appear to have exceeded 30. The three major departments, electrical assembly, mechanical assembly, and testing, each with its own immediate supervisor, performed their functions in a single

[2] A separate order has been issued correcting the record.

[3] The Union submitted a letter memorandum answering an argument made in Respondent's brief. Respondent replied objecting to the Union's memorandum. The argument largely concerns assertions of fact not contained in the record. I have disregarded these documents.

[4] The layoff of Mary Brown, then supervisor of the mechanical assembly department, and mother-in-law of Lynn Brown, is not alleged as a violation of the Act. Respondent's use of the term "permanently laid off" is synonomous with "discharged," for the record makes clear that Respondent intended that these employees should not be recalled even if work became available in a short time.

[5] In the representation election the year before, on March 23, 1979, 14 employees voted against the Union, 12 for.

[6] Respondent's counsel objected at the hearing and continues to contend vigorously that because of the limitations of Sec. 10(b) of the Act, Respondent's conduct occurring more than 6 months prior to the filing of the charges herein should not be received or considered. It is well established that conduct which occurred beyond the limitations period may be considered to shed light on acts within the period and to indicate motivation. See, e.g., *N.L.R.B.* v. *Laredo Coca-Cola Bottling Company*, 613 F.2d 1338, 1341, fn. 6 (5th Cir. 1980). Respondent also argues that the occurrences in 1979 were too remote in time to be considered. This contention is without merit.

room of about 5,000 square feet, which also served as a lunch area for the employees.

In early 1979, when a group of employees, including Manufacturing Manager Bosnick's son, were discussing a work stoppage to protest employee grievances, employee Gray suggested that they contact a union instead. The younger Bosnick, after obtaining the Union's telephone number from Supervisor Mary Brown, contacted the Union.[7] Union cards were distributed and the employees talked about the Union at the job.

After the Union filed a petition for certification on January 15, 1979, Respondent, as has been noted, distributed a series of letters to the employees and held a number of meetings designed to inform them that Respondent opposed unionization and desired that they vote against the Union. During these meetings, and even after the election, several employees, including Ferrell, Lynn Brown, Schucker, and Gray, questioned Bryan about Respondent's personnel practices and voiced dissatisfaction with working conditions. Bryan became particularly annoyed with Schucker's comments concerning the Union at one such meeting.[8]

Mary Brown and other supervisors were instructed to report on employee union activities to management. It would appear that, in carrying out Respondent's instructions, the supervisors engaged employees in conversations about the Union. Supervisor Wenk's assertion to an employee that the plant would close if the Union came in has been noted. In addition, Schucker testified to conversations with Supervisor Frank Rhein (erroneously spelled "Ryan" in some places in the record) in which Schucker felt impelled to state his strong support of the Union.

Notwithstanding, Bryan asserts that, in 1979, he could make "only the vaguest of guesses" as to the union supporters, except for Ferrell, Drummond, and Bosnick's son. He also asserts that, in 1980, he likewise had no basis for identifying union supporters until Lynn Brown, Ferrell, Harry, Gray, and Schucker testified at the hearing in this matter, asserting that there was no "overt or any other type of action that I knew about at any time up to yesterday that anybody had anything to do with union activity in the company." However, as noted, Respondent had been informed some 7 months previously through the charges filed in this matter that these employees had been union supporters. I was not favorably impressed with Bryan's candor in these matters.

In the latter part of April 1980, Ferrell, Schucker, and another employee, Willin, went to see the Union and secured authorization cards. Ferrell and Schucker distributed the cards to the employees on the parking lot adjacent to the plant before and after work, and at lunchtime.[9] It is indicated that all of the alleged discriminatees in this case continued to support the Union in 1980.

The Union filed a petition for representation in this matter on April 28, and an election was conducted on June 6, pursuant to a Stipulation for Certification Upon Consent Election. The valid votes counted were 10 to 7 against the Union. As noted, the challenged ballots of Lynn Brown, Ferrell, Gray, Harry, and Schucker are sufficient to affect the results.

C. *The May 13 Layoff*

1. The alleged reasons for the layoff

Respondent's principal product, an electronic stencil cutter for use on mimeograph duplicating equipment, is, for the most part, sold to a single customer, Gestetner. Beginning in 1976, Respondent and Gestetner entered into an agreement whereby Respondent would produce and Gestetner would accept a specified number of stencil cutters each month, which action would provide, according to President Bryan, relatively stable employment for Respondent's employees.[10]

In February 1980, Bryan attended a meeting with Gestetner in which the officials of that company requested that Bryan agree to amend their agreement so that Respondent would not send any machines to Gestetner Yonkers' facility during April, May, and June, then resume a normal rate of shipment for July and August, and finally ship at a reduced rate for September, October, November, and December of that year. Bryan agreed.

Bryan asserts that he decided that this change in shipments to Gestetner would require Respondent to reduce its work force about 15 percent, and that he, therefore, conferred with Manager Bosnick about this. He says that the two of them decided that Mary Brown, Lynn Brown, Ferrell, Gray, and Harry should be laid off. Nevertheless, according to Bryan, he decided not to lay these employees off until he and his wife returned from a trip to South America, where he states he thought he might pick up some additional business. This is confirmed by Bosnick. Bryan left for South America April 19 and, after obtaining no additional business, returned on May 6. As noted, he discovered, about May 8, that the Union had filed a petition for representation, and so he thereafter directed Bosnick to lay off, on Tuesday, May 13, the four employees and the supervisor they had discussed.

However, derogating from Bryan's insistence that he decided in March to lay these employees off, before he

[7] According to Manager Bosnick, his son left Respondent's employ before the election in 1979 to avoid embarrassing his father, but did tell his father that employees Ferrell and Drummond had accompanied him to the Union to obtain cards. Ferrell's termination is a subject of this case. Drummond became a supervisor in 1980.

[8] The General Counsel also presented proof, but does not seem to particularly rely on the fact, that some immediate supervisors in 1979 attended one union meeting at which the alleged discriminatees herein, and others, were present. At this or another union meeting, the sister of a supervisor took notes.

[9] Willin apparently has left Respondent's employment.

[10] Bryan referred to a layoff of two employees in 1975 because of a general business recession and asserted that there was a layoff of four employees in January 1980 due to a reduced demand for a product Respondent was then making. Employee witnesses who were asked recalled no layoffs for lack of work during their tenure, but remembered some employees were let go for "losing time," or because the employee was "part-time," or "quit" to go back to school. Bryan contends that all of these were permanently laid off. He testified that this was Respondent's policy, so that the employee could obtain unemployment compensation (the General Counsel points out that Maryland law makes no distinction between a permanent or temporary layoff for this purpose), and to relieve Respondent of any obligation to recall the employee.

became aware of any union activity, rather than in May, after learning of the Union's petition, is an 11-page letter (with 14 exhibits attached), dated June 19, submitted in this matter, by Respondent to the Regional Director, explaining in detail Respondent's defense to the charge herein. As the General Counsel points out, Respondent nowhere in this letter refers to any decision in March to lay off employees, asserting only:

> It became obvious to Mr. Bryan after the meeting on February 25 [with Gestetner] that the Company faced a drastic cut-back in production unless something was done to increase sales. However, he delayed laying off anyone or taking any other action until he had an opportunity to determine if additional orders would be obtained elsewhere.
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> [Before] entering the hospital on the following Monday [after his return from South America], it was necessary for Mr. Bryan to decide between May 7 and May 9 on the size of the layoff and to determine who would be laid off.[11]

Upon careful consideration of the entire record, I am convinced that Respondent's position here, that a firm decision was made in March, is much overstated. While it is quite conceivable that it may have occurred to Bryan in early March that a layoff might be a possibility, the facts are convincing that this idea did not harden into a firm decision at that time, nor was it then determined, as the June 11 letter clearly indicates, who would be laid off. First, since the timing of the decision is obviously a critical factor, if it had been made in March, as now contended, I would have expected it to be pointed out in the June 11 letter. It was not. Further, since an immediate layoff was not contemplated, it is difficult to understand why Bryan and Bosnick then went through the assertedly lengthy process of determining precisely who was to be laid off in the event a layoff became necessary in the future. In addition, if Bryan and Bosnick had, indeed, in March, selected those to be laid off, it is strange that they did not carry through and make the layoff at that time, as good business practice would seem to dictate. Respondent's explanation—that it was hoping for new business—is more superficial than satisfying. Respondent could have readily foreseen in March, and apparently did foresee, the excess inventory and poor cash position which it now complains required layoffs in May, both of which would have been avoided by reducing the work force in March. No reason appears why Respondent could not have recalled the laid-off employees if the new business materialized,[12] or—as later events demonstrated—hired new employees in their place. On the whole it seems clear that Respondent did not decide in March that there would be a layoff in the future, or at that time select specific employees for layoff.

[11] The letter was prepared by an attorney after conferences with Bryan and Respondent's supervisors. Bryan read and approved the letter before it was sent.

[12] The record is persuasive that Respondent has in the past rehired employees who assertedly had been permanently terminated.

2. Selection of employees for layoff

The selection of employees for layoff on May 13 seems to have been largely subjective. No consistent principle seems to apply throughout. It is not denied that Manager Bosnick, after the end of the union campaign in 1979, told employees that, if there would be a layoff, it would be made in the order of seniority. However, the layoffs, when made, were not in the order of seniority. It is further not disputed that the employees let go were good workers who had not previously been reprimanded, or warned, or advised that they might be laid off.

Employee Gray, employed in electrical assembly, was the most senior in that department. Bryan states that she was let go because she was the highest paid employee in the department and others could do the work she did. However, Gray's testimony that the next most senior employee in the department, Shauck (who was retained), was scheduled shortly to be advanced to Gray's wage rate is not denied.

But no other employee, except possibly Supervisor Mary Brown, was selected for layoff because that employee was receiving the highest rate in the department. Thus employee Harry, who was receiving next to the lowest wage rate in the electrical assembly department (see Exh. N, attached to G.C. Exh. 7, which was prepared by Respondent), was assertedly released because a higher rated employee, who Bryan says he felt would be more productive than Harry, could do her job.

The remaining two employees laid off, Lynn Brown and Ferrell, were employed in the mechanical assembly department, which, it was testified, did not require particular skill or experience. According to Bryan, Ferrell, who was next to the lowest paid employee in the department, was replaced by Howland, a higher rated employee, who Bryan and Bosnick felt could do Ferrell's job as well as his own.[13] On the other hand, it was stated that Lynn Brown was laid off because "we felt we had a backup . . . who could step in there and do that job . . . [who] happened to be a lower wage person."

3. New hires—overtime work

As previously noted, 2 weeks before the layoff on May 13, Respondent hired a new employee, Pistorio, in the mechanical assembly department to replace a recently terminated employee. The new employee was also retained during the layoff, quitting Respondent's employment in July. Another employee, Cheryl Wilkinson, who had been terminated in January, was reinstated in the same department on April 8.[14] Both of these acquisitions

[13] Bosnick, on cross-examination, did not seem well acquainted with Howland. When asked if he was a good employee, Bosnick first replied, "I supposed so," then assented to the suggestion that he was "versatile." Bosnick also stated that Howland had more seniority than "many of the employees in that department," when, in fact, he was in the lower half among employees in the department.

[14] It was stipulated that Respondent's records show that she had been terminated. Respondent's counsel asserted that she was on maternity leave to which the General Counsel also agreed. I conclude that this is another instance in which Respondent decided to reinstate a previously terminated employee.

occurred, obviously, after the date Respondent asserts it had selected four other employees for layoff.

In July, Respondent hired seven employees in the mechanical assembly department, one part time, for various reasons; in the test department, three employees were hired in May (two of these just for the summer), one in June, and one in August. Two of these three full-time employees quit before the end of the year; in electrical assembly, Respondent hired four employees in October. Three of these were terminated by January 20, 1981; Respondent also hired seven rank-and-file employees (one for the summer) in other departments between May and September. Five of these full-time employees terminated their employment by mid-September.

In July, Respondent received new orders from Gestetner and from other sources which it had not expected. In addition to hiring new employees as indicated above, Respondent decided to "subcontract" the work out to employees presently employed to be performed at home. For this work, which was performed from July until mid-February 1981, Respondent paid at overtime rates of time and a half.

Certain lists of employees in the record show that the numbers of employees in the appropriate unit remained approximately the same throughout the relevant period, indicating that Respondent, in fact, may have replaced the laid-off employees, or most of them, by the end of June. Thus, as noted, as of the date of the election, June 6, there were approximately 22 employees in the unit (if Ferrell, Lynn Brown, Gray, and Harry are included). At the end of June, according to Respondent's pension lists, there were 21 in the unit, and at the end of September, 20.

D. *The Discharge of Schucker*

At the time of his termination on May 16, Schucker had been employed in Respondent's testing department for about a year and 8 months. The job requires some considerable skill[15] and there is no contention that Schucker's work performance on the job was inadequate. Indeed, he was used to train new employees on the job.

During Schucker's tenure with Respondent, working hours in the testing department tended to be flexible. Unlike the mechanical department and the electrical department, which were assembly line operations, the testing department required only that employee achieve certain standards of personal production. So long as these standards of production were met, it does not appear that Respondent objected to testing department employees coming in late, or leaving early, or taking longer lunch periods.

In January 1980, during a period when Schucker was not maintaining personal production on his job—because, he asserts, of difficult working conditions and certain special work assignments—his supervisor, Rhein, told him that Bryan had directed that Schucker be laid off. Before this layoff was actually put into effect, Bryan called Schucker into his office where he explained that he had ordered Schucker laid off because the latter had missed too much time, and hence did not meet production, and because Bryan had heard that Schucker was seeking new employment. Nevertheless, since Bryan had just been informed that Rhein was leaving Respondent, Bryan asked Schucker to continue his employment with Respondent. Schucker agreed.

During the first quarter of 1980 until Schucker was terminated he agrees that he did not work a full 40 hours in any workweek. Nevertheless, Schucker was not reprimanded or admonished about this until May 16, 3 days after the layoffs noted above.

On May 13, in the morning, Schucker advised his supervisor, Robert Sikora, that Schucker had a number of hours of vacation remaining and wanted to use them at various times during the week, noting with Sikora the shortage of testing work to be done at the time. Sikora assented to this suggestion. Schucker punched out for lunch about noon with employee Willin who was leaving that day for another job. The two of them did not return to the plant until about 5 p.m. Upon his return, in response to Sikora's query as to where he had been, Schucker said he wanted this to be taken as part of his vacation hours. Sikora replied, "Okay, that would be fine."[16]

According to Bryan, who at the time of these events was in the hospital, on Thursday evening, May 15, an employee in Respondent's sales department who was visiting Bryan mentioned Schucker's long absence from work on Tuesday and surmised that Schucker might have been drinking at lunch. On Friday, May 16, Bryan called Sikora and informed him, according to Sikora, that Bryan was considering terminating Schucker because of his past poor attendance, his absence from work on Tuesday, and the possibility that he had been drinking. There is no direct evidence as to what Sikora said to Bryan, beyond confirming that Schucker was very late coming back from lunch and that Sikora could not confirm that Schucker had been drinking. Later that day, upon instructions from Bryan, Sikora told Schucker that he was being "laid off" for the reasons stated by Bryan. In response to a direct question by Schucker, Sikora denied that the termination was caused by Schucker's union activities.

It is not contended that at this time Schucker was deficient in his production.

E. *Analysis and Conclusions*

1. The May 13 layoff

At the outset, Respondent asserts that it was not aware *when it decided* to lay off four unit employees that there was any union activity occurring or that three of the four entertained prounion sentiments, though it is admitted that when the layoffs were *effectuated*—when the employees were told of their terminations—Respondent

[15] In Respondent's statement of position submitted to the Regional Director it is stated that "the position requires 2 years of electrical engineering," possibly something of an overstatement.

[16] These findings are based on Schucker's credited testimony, which is not denied by Sikora. Sikora denies only that Schucker had indicated that he was going to take time off that day. Schucker asserts that he did not specifically ask Sikora for the time off that day, because Sikora was in a meeting when he and Willin left.

was aware that a petition for certification in Case 5-RC-11199 had been filed by the Union. It has been found, for reasons set forth above, that despite Respondent's protestations to the contrary, the decision to lay off as well as the effectuation of that decision was made after receipt of notice of the petition.

Further, I am satisfied, on the record as a whole, that Respondent knew or surmised the prounion sentiments of the four employees who were laid off. Respondent employs only a small number of unit employees, all engaged in production activities in a small room under three immediate supervisors. In the union campaign for recognition the year previous it does not appear that the employees sought to conceal their sentiments. Indeed, there is much evidence of outspoken comments concerning the Union and criticism of Respondent's working conditions during and after that union campaign. In addition, the evidence shows that the immediate supervisors were instructed to report on employee union activity, indicating that Respondent was actively seeking information in order to assess its position in the coming election. Reports by supervisors, who were engaging employees in conversations about the Union, would constitute an effective aid in that process. Respondent President Bryan admits to "vague guesses" as to employees supporting the Union. Since only 12 voted for the Union (and 14 against) in that previous election, it should not have been difficult in the circumstances to "guess" most, if not all, of the union supporters.The Board, faced in *Portsmouth Lumber Treating, Inc.*, 248 NLRB 1170 (1980), with a situation much like that in the present matter, held, on the basis of well-established authority, that even if the employer involved did not know as a fact that the specific employees laid off were union supporters, a violation of the Act was nevertheless made out where the facts showed that the employer used the layoffs as an act of reprisal designed to blunt the union effort by a drastic display of employer authority and control over the employment relationship.

Here, as in *Portsmouth Lumber*, the timing of the layoffs is significant, coming immediately upon notification to Respondent that for the second year in a row the Union was seeking a representation election. Respondent was, of course, well aware that, despite Respondent's campaign against the Union, a switch of only two votes would have given the Union victory the year before, indicating that more effective action might be needed this time around.[17] Further, as stated by the Administrative Law Judge in *Portsmouth Lumber* (248 NLRB at 1171), "Because I believe that [Respondent] did have knowledge of the petition [before deciding to lay off these employees], I am constrained to infer the probability of unlawful motivation not simply from the possession of such knowledge but, as well, from the falsity of its [contention that it had none]."

Finally, upon close analysis, I have great difficulty accepting Respondent's contention that it laid off the four employees because of loss of business, excessive inventory, and reduced cash position in May. Thus, the business was lost at the end of February, at which time Respondent now asserts it knew it would have to lay off employees in order to avoid such financial difficulty and excess inventory. But Respondent did not lay off employees then and "tighten its belt" financially. Rather, Respondent continued with business as usual and did not lay the employees off until it received the union petition in May, raising a strong inference that the receipt of the petition was the motivating factor in Respondent's decision to lay off the employees.[18]

Respondent's conduct after its business picked up in July further confirms the conclusion that the layoff in May stemmed from a desire to get permanently rid of these four employees because they were prounion, rather than because of Respondent's business situation. Thus, when business improved considerably within 2 months of the layoff, Respondent did not recall the laid-off employees, but hired new employees,[19] and "sub-contracted" substantial work to its retained older employees at overtime rates. Respondent explains this odd behavior on the basis of an asserted general policy not to rehire laid-off employees, but to hire new employees at lower rates than received by the older employees, thus saving money. But it is clear from the record that Respondent has frequently rehired laid-off or otherwise terminated employees. It is also inferred that, as in other businesses, Respondent paid higher rates to older employees because of their added value to Respondent.[20] Not only are new employees of less experience also of less value, but Respondent also incurs the cost of integrating them into its operations. Finally, this argument—that Respondent did not recall the laid-off employees in an effort to save money—is severely undercut by Respondent's willingness to work its retained employees overtime at premium rates rather than rehire the laid-off workers.

On the basis of the above and the record as a whole, I find that Respondent terminated Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, and Grace A. Harry, not for business reasons as asserted, but in order to defeat the union organizing effort, and thereby violated Section 8(a)(1) and (3) of the Act.

[17] President Bryan asserts that he decided not to campaign against the Union because he was in the hospital and felt that the employees would remember his position of a year ago. It is self-evident that, even more strongly than memories of Respondent's past opposition to unionization, the employees would recognize the impact of four union supporters losing their jobs immediately upon a new election having been requested.

[18] Respondent's contention that it had waited until May in order to see if a South American trip would generate business has been previously considered. As noted, it does not adequately explain why, if Respondent really considered a layoff necessary, it did not put it in effect in February or early March. Indeed, between February and May, Respondent actually hired one new employee and reinstated a previously terminated employee, both of whom were retained at the time of the layoff.

[19] The record indicates that, by the end of June and perhaps before, the number of employees in the unit was already approximately the same as before the layoff.

[20] As recently as April 16, 1979, Respondent formally announced that it had adopted a system of pay increases based on years of service (rather than a system of "equal pay for equal work" which "would benefit our new employees") because "The company believes that of the two systems, the one based on years of service is in the long range interest of our employees since it results in higher pay than otherwise for those who stay with the company. It benefits the company if it results in a more stable work force, and it is believed that it does so." (See G.C. Exh. 8.)

2. The termination of Schucker

Schucker was a skilled employee whom Respondent in January 1980, in spite of complaint about his production and attendance at the time, decided, nevertheless, to retain. He worked in a department in which erratic hours of work and attendance had long been tolerated so long as production was maintained. Indeed, though Schucker was employed as a full-time employee, he had missed time in every week from January through May 1980, but without any comment on this from Respondent. There is no contention that he did not maintain his production during this period.

On May 13, Schucker punched out at noon and did not return to the plant until 5 p.m. It is not disputed that work in his department was slow at the time and Schucker was entitled to use the time as part of his vacation benefits. Though he failed to ask his immediate supervisor in advance for permission to take the afternoon off on May 13, the supervisor specifically acquiesced in Schucker's using this time as part of his vacation, after Schucker returned. The supervisor neither disciplined Schucker nor sought to have him disciplined for his absence that day.

At this time, as noted above, Respondent President Bryan was in the hospital. Schucker's absence from the plant all afternoon on Tuesday was reported to Bryan by a member of the sales force, who surmised Schucker had been drinking. On Friday, May 16, after consulting with Schucker's supervisor by telephone Bryan asserts that he decided to let Schucker go because of his losing time in January, his absence from work on May 13, and the suspicion that he had been drinking that afternoon.[21] Schucker was "laid off" by his supervisor that afternoon.

Though Bryan contends that he was unaware that Schucker was a union supporter at the time, the evidence is clear that, during the 1979 union campaign, Schucker made comments in meetings with Bryan that the latter understood were prounion and resented. Schucker's position in favor of the Union was also known to his supervisor.

In short, Schucker's absence from work on May 13 was approved by his supervisor after his return, and in fact constituted "vacation time" to which he was entitled under Respondent's benefit program; his absence did not interfere with production because production was slow, for lack of parts, at the time; Schucker's supervisor did not complain of his absence or seek his discipline. In these circumstances it is not logical or reasonable that Bryan would discharge Schucker for his absence on May 13 if he knew the facts. The record shows that Bryan did consult with Schucker's supervisor concerning the matter before making the decision to terminate Schucker, but does not describe at length the discussion between them. However, I infer that Bryan asked to be fully informed and that the supervisor did so.

In these circumstances I can only conclude that Bryan seized upon this instance as a pretext to get rid of Schucker, a vocal supporter of the Union, to more certainly insure the defeat of the Union in the pending election.

[21] This suspicion was not confirmed by the supervisor.

Respondent, however, argues that its failure to terminate Schucker in January, when it had reason to do so, or on May 13 when it laid off others, shows that it was not animated by hostility to the Union in letting him go on May 16. However, so far as is shown, Respondent, in January, had no reason to believe it continued to have a union problem. Since Respondent's selection of employees for layoff on May 13 followed no discernible logical pattern, it can only be speculated as to the reason for overlooking Schucker. However, the fact that not all union supporters were selected for elimination in the first instance does not detract from Respondent's purpose or the impact of its action. When Schucker contemporaneously seemed to present an opportunity to eliminate one more union supporter, this was immediately seized upon.

For the reasons stated I find that Respondent, by terminating Richard Schucker, violated Section 8(a)(1) and (3) of the Act.

F. *The Objections to the Election and Challenges to Ballots*

In accordance with directions contained in the order consolidating cases herein, the issues in Case 5-RC-11199 heard herein are hereby transferred to the Board for decision. I find, for reasons set forth above, that the termination of employment of Lynn Brown, Harry, Gray, Ferrell, and Schucker, in violation of the Act, interfered with the employees' freedom of choice and prevented a free and fair election in Case 5-RC-11199, and recommend to the Board that the challenges to the ballots of the named employees be overruled and their ballots be opened and counted; further, that if the results of the election show that less than a majority of the votes have been cast in favor of the Union, then that the election be set aside and a new election be ordered to be held at an appropriate time; and further that Case 5-RC-11199 be remanded to the Regional Director for Region 5 to carry out these directions.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by the termination of Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, Grace A. Harry, and Richard C. Schucker to discourage membership in and support of the Union violated Section 8(a)(3) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discriminated against Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, Grace A. Harry, and Richard C. Schucker in violation of the

Act, it will be recommended that Respondent offer each of them immediate and full reinstatement to the position each of them held at the time each was terminated or, if such position no longer exists, to a substantially equivalent position, without prejudice to the seniority or other rights or benefits each possessed, and make each of them whole for any loss of pay or benefits which each may have suffered by reason of his (or her) termination from employment, by payment to each of them a sum of money equal to that each would have earned as wages or other benefits from the date of his (her) termination to the date of his (her) reinstatement, less his (her) net earnings during that period and interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:

ORDER[22]

The Respondent, Instrument Corporation of America, Baltimore, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, laying off, terminating, or otherwise discriminating against employees because they join, support, or engage in activities on behalf of a labor organization.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of rights protected under Section 7 of the National Labor Relations Act, as amended.

2. Take the following affirmative action which it is found will effectuate the purposes of the Act:

(a) Offer Elizabeth Lynn Brown, Frank Ferrell, Fay Gray, Grace A. Harry, and Richard C. Schucker immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, and make each of them whole for any loss of earnings or benefits each may have suffered by reason of their termination from employment, in accordance with the provisions set forth in the section hereinabove entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its operations in Towson, Maryland, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[22] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."